



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 03, 2023

IN THE MATTER OF:

Appeal Board No. 628537

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective October 14, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by TRANSDEV SERVICES INC prior to October 14, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 8, 2023 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed for more than 20 years by the employer transportation company and its predecessor. The claimant was a "fixed route" bus operator working about 40 to 48 hours a week. The employer had a zero tolerance policy regarding violence at work, of which the claimant was aware.

On July 29, 2020, the claimant was suspended for three days following a passenger complaint, which resulted in an investigation and a finding that the claimant unprofessionally addressed a passenger, instigated the interaction, left the protective barrier of her driver's area and exited the bus to

antagonize a physical confrontation with the passenger. The incident was precipitated by the passenger refusing to wear a mask on the bus, though mask-wearing on mass transportation was protocol. The suspension called the claimant's conduct "egregious" and "unbecoming" of a bus operator, and advised the claimant that, "[A]ny future disciplinary actions of a similar nature can and will lead to further disciplines up to and including termination."

As part of the training the claimant received in connection with her employment, and in connection with the July 2020 discipline, the claimant was given suggestions for de-escalating incidents that might arise with passengers. In particular, with respect to "fare evaders," drivers, including the claimant, were instructed that the first time a bus rider got on the bus without paying, the bus operator was to remind them of the fare so that the bus patron had it available for the next ride; if a pattern of fare evasion continued, the bus operator was to call the command center for instructions on how to proceed.

On September 21, 2022, a passenger who was a frequent fare-evader, boarded the claimant's bus, and did not pay the required fare. The claimant advised the patron that she had to pay the fare, but the passenger did not, and proceeded to the back of the bus. The claimant turned off the ignition, and communicated to the fare evader that the bus was not going anywhere until she paid the fare. The claimant was about to contact the command center for instructions, when another passenger offered to pay the evader's fare, and did so. As the claimant was about to start the bus again and proceed with her route, the fare evader made her way to the front of the bus and began to yell at the claimant. The claimant responded that the evader's fare had been paid, and she should go have a seat. The claimant repeated this direction three times, but the evader did not move and continued to argue with the claimant. The evader then spat on the claimant's face over the plexiglass divider that partially separated the bus operator's area from the passengers. A tussle ensued, with the passenger and the claimant hitting each other. To protect herself, the claimant grabbed a metal rod which was located in the driver's area, and hit the fare evader. Around the same time, the passenger who had paid the evader's fare came back to the front of the bus, and placed the evader in a headlock, attempting to defend the claimant. The evader stabbed the other passenger with a knife twice before he was able to eject her from the bus, and the claimant closed the bus doors. The claimant immediately notified the command center and called the police.

The claimant was paid through October 7, 2022, then suspended without pay pending grievance proceedings. These proceedings resulted in the parties entering into mediation, which concluded with the claimant being reinstated to her position as of December 19, 2022.

OPINION: The credible evidence establishes that the claimant was suspended without pay on October 7, 2022 because the employer concluded that the claimant initiated and instigated a physical altercation with a passenger on September 21, 2022, violating the employer's policy prohibiting violence.

Initially, we note that not all violations of policy constitute misconduct for unemployment insurance purposes. Further, and significantly, the record fails to establish that the claimant was the aggressor or the initiator in the physical contact that occurred between herself and the fare-evading passenger on her bus, or that the claimant abused her discretion when dealing with the frequent fare-evader, as the employer contends. Rather, the claimant's credible firsthand testimony establishes that the fare evader was the instigator in this situation, by her conduct of returning to the front of the bus to argue with the claimant, by failing to follow the claimant's multiple directives to sit back down because her fare had already been paid, and finally by spitting in the claimant's face.

Although the claimant testified that she cannot recall who it was who "threw the first punch," the fare evader had already thrown the figurative first punch by spitting in the claimant's face. The claimant, in the semi-confined area designated for the bus operator, could not retreat; indeed, she had nowhere to retreat to. We find that the claimant's conduct in response to the fare evader's assault was a spontaneous reaction to that assault. We have held that such spontaneous reactions, even when technical violations of an employer policy, do not constitute misconduct for unemployment insurance purposes. See, generally, Appeal Board Nos. 622293, 622250A, 551256.

We are not convinced by the employer's contention that the claimant was the aggressor in the September 21, 2022 incident, and that her conduct was not only a violation of the employer's policy, but was similar to conduct about which she had previously been warned. We note that the employer's witness was not present during the September 21 altercation, and therefore presents no firsthand account of the event. While this witness testified that he got his information from watching a video of the incident, the employer although represented made no attempt to provide a recording of the event, either before

or at the hearing. The claimant provides the only firsthand testimony, and we find her testimony to be consistent and credible.

Further, the evidence fails to establish unreasonable or inappropriate conduct by the claimant in her initial response to the fare evader's nonpayment. Rather, the evidence establishes that the claimant, an experienced bus operator employed for many years by the employer and its predecessor, followed the employer's protocol for dealing with frequent fare evaders, and was about to call the command center and report what was happening when the fare was paid, and the evader pursued and escalated the issue.

Finally, we find that the July 2020 incident for which the claimant received a warning, was too remote in time from the event that led to the claimant's suspension, termination, and ultimate reinstatement, to constitute notice that her conduct on September 21, 2022 would jeopardize her employment. Although the employer's senior transportation manager testified that for the employer's purposes, disciplines for egregious conduct "last" for eight years, for unemployment insurance purposes, a warning more than one year in the past has been held by the Board to be too remote in time to place a claimant on notice that her job might be in jeopardy. See, for example, Appeal Board Nos. 564793. We also note that the conduct that resulted in the July 2020 warning involved the claimant's behavior of leaving the protected "bus operator" area and following a passenger off the bus. The claimant's conduct on September 21, 2022 included her staying within the protective barrier, from which she had nowhere to retreat during the physical assault by the non-paying passenger. Therefore, the claimant's conduct was not sufficiently similar to her conduct in July 2020 to place her on notice that her actions on September 21, 2022 could result in her discharge.

Under the circumstances of this case, we find that the claimant's conduct was a spontaneous reaction to being assaulted, and does not constitute misconduct for unemployment insurance purposes. Accordingly, we conclude that the claimant was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective October 14, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to October 14, 2022

cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER